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No. 96-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH ONCALE,

Petitioner,

vs.

SUNDOWNER OFFSHORE SERVICES, INC., JOHN LYONS, DANNY PIPPEN, and BRANDON JOHNSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether harassment of an individual by a person of the same gender cannot state a sexual harassment claim under Title VII as a matter of law, regardless of whether the harassment has sexual overtones or is motivated by the sex of the victim.

LIST OF PARTIES

1. Joseph Oncale, Petitioner.
2. Sundowner Offshore Services, Inc., Respondent.
3. John Lyons, Respondent.
4. Danny Pippen, Respondent.
5. Brandon Johnson, Respondent.

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BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, rendered May 20, 1996, is reported at 83 F.3d 118. The opinion of the United States District Court for the Eastern District of Louisiana, rendered March 24, 1995, which the court of appeals affirmed, is not reported.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion and entered judgment on May 20, 1996. The petitioner filed a timely Petition for Writ of Certiorari within 90 days of the judgment, pursuant to 28 U.S.C.

§§ 1214 and 2101(c) and Supreme Court Rule 10(c). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(b).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This action involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a)(1), but without reference to the amendments enacted by the Civil Rights Act of 1991.

INTEREST OF *AMICUS CURIAE*

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 2,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before this Court, singly or jointly with other *amici*. Some recent cases are *Oubre v. Entergy Operations, Inc.*, 117 S. Ct. 1466 (1997); *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996); *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); and *Hazen Paper Co. v. Biggins*, 508 U.S. 948 (1993).

NELA members represent thousands of individuals in this country who are victims of unlawful employment discrimination. Employment discrimination cases involving disparate treatment are notoriously difficult to prove. First, under the various statutes that prohibit such discrimination, our clients must prove by a preponderance of the evidence that the decisionmaker's motivation was unlawful. Unfortunately, few defendants confess to having an illegal motive, and NELA members face substantial hurdles in meeting their burden of proof. Second, additional barriers to proving our clients' cases have recently been adopted by lower courts, ranging from the

"same actor" and "stray remark" defenses to the misapplication of agency principles.

– The decision of the court of appeals in the present case raises yet another barrier to individuals who seek to be free from discriminatory conduct and sexual abuse in the workplace. By predicating an employer's liability upon the gender of the perpetrator, a factor over which the victim has absolutely no control, the court of appeals would deny any remedy to the victims of such abuse. Adoption of such a bright-line but arbitrary test also would open the door to significant unintended consequences, such as the dismissal of a disability discrimination case if the decisionmaker had a disability. Congress intended no such preclusion of any remedy based merely upon the class membership of the decisionmaker or perpetrator. Rather, it directed courts to look at the status of the victim.

Title VII was intended to strike at the entire spectrum of discrimination in the workplace, regardless of whether the alleged lawbreaker is of the same gender, same race, or same religion as the victim of the discrimination. To protect the interests of its members' clients, therefore, the interest of NELA in this case is that of ensuring that Title VII's goal of eradicating employment discrimination is fully realized.

NELA submits this brief because of the importance of the issues at bar to furthering its goals. The position that NELA takes in this brief has not been approved or financed by petitioner or his counsel. The written consents of all parties have been or are being filed with the Clerk of this Court.

STATEMENT OF CASE

Joseph Oncale worked for respondent, Sundowner Offshore Services, Inc., for approximately four months in 1991. He filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), alleging that he had been sexually harassed by respondents John Lyons (his supervisor) and Danny Pippen and Brandon Johnson (two coworkers). The district court granted summary judgment to respondents on

March 24, 1995, on the ground that, as a matter of law, sexual harassment by persons of the same gender did not violate Title VII. The United States Court of Appeals for the Fifth Circuit affirmed the decision on May 20, 1996.

INTRODUCTION

In employment discrimination cases, the motivation of the decisionmaker or actor is a classic fact issue. Its importance is derived from the "because of" language of Title VII. Since the "because of" language appears in the statute, it is intrinsic to all Title VII disparate treatment cases, including sexual harassment cases.

Yet sexual harassment is qualitatively different from most other kinds of employment discrimination, and the template of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), does not fit. Most employment discrimination cases involve negative employment decisions motivated by hostility to a class of which plaintiff is a member. Sexual harassment may spring from feelings of anger and hostility to men or to women, or it may arise instead from sexual attraction. The similarity lies in the harm suffered by the victim.

"Sexual harassment" covers a wide range of actions, including but not limited to these:

- harassment of a victim because the perpetrator dislikes persons of that gender or does not want persons of that gender in a given job (*see, e.g., Intlekofer v. Turnage*, 973 F.2d 773 (8th Cir. 1992); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988));

- unwelcome attentions, "romancing," or stalking because the perpetrator is sexually attracted to the victim (*see, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986));

- abuse of power by forcing clearly offensive, sexually oriented words or actions on an unwilling but vulnerable victim (*see, e.g., Harris v.*

Forklift Sys., Inc., 510 U.S. 17 (1993); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994); *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657 (D. Minn. 1991));

- harassment by sexually oriented means of an individual whom the perpetrator dislikes for non-gender-related reasons (*see, e.g., Doe v. City of Belleville*, 1997 WL 400219 (7th Cir. 1997)).

Courts on both the trial and the appellate levels are in disarray about which, if any, of these scenarios violates Title VII when both perpetrator and victim are of the same gender.

As a result of the courts of appeals' difficulty in determining whether to look beyond the plain language of Title VII, the law differs dramatically from circuit to circuit. Accordingly, the fundamental right of an individual to be free from workplace harassment "because of such individual's sex" depends in some jurisdictions upon the sex of the harasser, in other jurisdictions upon the sexual orientation of the harasser, and in other jurisdictions upon neither.

The court-created defenses (a) that "'because of sex' requires the harasser to be sexually attracted to the victim" (Fourth Circuit) and that (b) "anything men do to other men, or women do to other women, cannot possibly be 'because of sex'" (Fifth Circuit) are red herrings. They muddy the statute, divide courts, create unequal justice, and deprive victims of basic statutory rights. These defenses also distort the otherwise well-defined summary judgment standard, since the "because of" language of Title VII is quintessentially a fact issue unless a plaintiff has no evidence to support his claim or it is barred as a matter of law.

Like the statute, this Court has consistently used gender-neutral language when speaking about both perpetrator and victim. Moreover, in non-harassment Title VII cases, this Court has encountered no difficulty with the concept that a person's discrimination against another person of the same sex may violate Title VII. *See Johnson v. Transp. Agency*, 480

U.S. 616 (1987) (male plaintiff brought Title VII sex discrimination action based on allegedly discriminatory decision in favor of a woman, made by another man); *see also Wilson v. Bailey*, 934 F.2d 301 (11th Cir. 1991) (sex discrimination claim brought by male plaintiff; no significance ascribed to fact that decisionmaker was also male); *McQuillen v. Wisconsin Educ. Ass'n Council*, 830 F.2d 659 (7th Cir. 1987), *cert. denied*, 485 U.S. 914 (1988) (same).

The *amicus* respectfully submits that the anomaly created by the circuit court's reading of Title VII cannot be permitted to continue. The decision below should be reversed.

ARGUMENT

The court of appeals in this case held that, regardless of any other facts, Title VII as a matter of law does not encompass any instance of same-sex sexual harassment. It allowed no exceptions, regardless of the egregiousness of the behavior or even a confession by the perpetrator. This decision erroneously deprives a large group of people (indeed, potentially everyone) of the right to be free from sexual harassment in the workplace, based upon a factor over which they have no control: the gender of their harassers. No victim of discrimination -- whether it be based upon religion, race, or sex -- chooses the oppressor. Indeed, no victim of discrimination would voluntarily assume that role at all. Nonetheless, the court of appeals would deny these unwilling victims their statutory rights merely because, in addition to being selected for victimization, they were selected by the wrong harassers.

I. WHETHER JOSEPH ONCALE WAS HARASSED BECAUSE OF HIS SEX IS PROPERLY A QUESTION FOR A FACTFINDER, AND SUMMARY JUDGMENT WAS INAPPROPRIATE.

A. The Standard.

The Fifth Circuit Court of Appeals erred in granting summary judgment in the face of a genuine issue of material fact: whether Joseph Oncale's harassers were motivated by his sex or gender, as opposed to a gender-neutral (even though

offensive) reason. This question, which should properly have been submitted to a factfinder for resolution, instead was decided by the district judge on a motion for summary judgment.

Properly used, a motion for summary judgment legitimately tests a party's ability to put forth sufficient evidence at trial. Improperly used, it allows courts to truncate the proof process in the presence of disputed material facts. Here, the court below decided, in effect, that whether the harassers acted "because of" Joseph Oncale's sex was not a material disputed issue, based upon an irrebuttable presumption having neither statutory nor logical foundation.

Summary judgment is a drastic remedy and must be exercised with care to avoid taking genuine issues of fact away from juries. *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir. 1990); *see Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The standard for summary judgment is well established in this Court. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita*, *supra*; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). It may not be granted when the nonmoving party shows the existence of material disputed facts. Fed. R. Civ. P. 56(e). Factfinding is not appropriate on summary judgment when material facts are disputed; the district judge's function is not to weigh the evidence and determine the truth of a matter but to determine whether there is a genuine issue for trial on a disputed material fact. *Anderson*, 477 U.S. at 248-49. Moreover, the quantum of proof required to preclude summary judgment is only "enough evidence so that a reasonable jury could return a verdict" for the nonmoving party; it need not rise to actual proof of the case. *Id.* at 248.

These standards have been jettisoned altogether in decisions of the Fifth Circuit Court of Appeals, including the case at bar, concerning same-gender sexual harassment. Instead of considering whether (as the statute says) an individual can show that he or she was "discriminate[d] against . . . *because*

of such individual's ... sex," 42 U.S.C. § 2000e-2(a)(1) (emphasis added), this circuit court of appeals presently requires summary judgment for the employer in every same-gender sexual harassment case without ever reaching that question. We respectfully submit that this is error.

B. Material Factual Issues in Sexual Harassment Cases.

The elements of a hostile environment sexual harassment case have been described by this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). In brief, a plaintiff who alleges hostile environment sexual harassment can prevail by offering proof of unwelcome sexual conduct or "discriminatory intimidation, ridicule, and insult" that is so severe or pervasive that it alters the victim's conditions of employment by creating an abusive or hostile workplace. *Harris*, 510 U.S. at 21, *quoting Meritor*, 477 U.S. at 65, 67. Indeed, both *Meritor* and *Harris* make only passing mention of the question whether harassment of an explicitly sexual nature could be anything but "because of [the victim's] sex."

In practice, whether sexually oriented words or conduct must also be shown independently to have been motivated by the plaintiff's sex is seldom an issue when harasser and victim are of different genders.[1] Most courts recognize the inference, or presumption, as being obvious. *See, e.g., Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 604 (7th Cir. 1985). Courts tend to focus insead on whether the harassment occurred at all, whether it was uninvited, whether it was sufficiently severe or pervasive to change the plaintiff's terms or conditions of employment, whether it was both subjectively and objectively offensive, and whether the employer had either actual or constructive notice. They generally assume that, when a man sexually harasses a woman in the workplace, he does so because of her sex. *See, e.g.,*

[1] A principal exception is, again, the Fifth Circuit. *See, e.g., Nash v. Electrospace Sys., Inc.*, 9 F.3d 401 (5th Cir. 1993).

Nichols v. Frank, 42 F.3d 503, 411 (9th Cir. 1994); *Horn, supra*, 755 F.2d at 604.

As the Seventh Circuit Court of Appeals recently noted, however, "courts by and large have been unwilling to make the same assumption when a man harasses another man in the workplace, however rife the harassment may be with sexual innuendo, sexual contact, and other conduct of an explicitly sexual nature." *Doe v. City of Belleville*, 1997 WL 400219, at 9 (7th Cir. 1997), *citing McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996), and *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996). We respectfully submit that there is no reason to distinguish among cases of sexual harassment based upon either the gender or the sexual orientation of the alleged perpetrator.

C. The Allegations State Every Element of a Viable Title VII Claim.

The factual allegations in the case now before the Court support every element of a classic hostile environment sexual harassment claim -- and support it abundantly. The court of appeals did not grant summary judgment based upon any failure of proof.

Joseph Oncale alleged, and on a motion for summary judgment his allegations must be taken as true, that (a) the conduct of which he complained occurred, (b) it was unwelcome, (c) he conveyed to the harassers that their actions were offensive to him, (d) the actions were severe and pervasive enough to alter his terms and conditions of employment, (e) Sundowner was apprised of the conduct and its unwelcome nature, (f) Sundowner failed to take prompt, effective remedial action, and (g) he was injured thereby.

Each of these elements is both highly material and highly factual. Accordingly, if any one or more was disputed, summary judgment should not have been granted. *See Meritor*, 477 U.S. at 68. It is not an element of a plaintiff's Title VII claim, however, that the gender of the harasser(s) must be

different from the plaintiff's own. In fact, in cases when the harasser and victim are of different genders, most courts have not considered the sex of the harasser worth mentioning, even in passing, when they set forth the elements of the cause of action.[2]

II. THE DECISION BELOW ERRONEOUSLY CARVED OUT AN EXCEPTION TO TITLE VII AND FAILED TO ACKNOWLEDGE WELL-ESTABLISHED PRINCIPLES OF LAW.

The Fifth Circuit Court of Appeals held that, as a matter of law, a man has no remedy under Title VII for sexual harassment by another man. This holding direct conflicts with two closely related principles developed over the years in this Court.

First, this Court recognizes that members of an advantaged group have the same legal rights under Title VII as do those in disadvantaged groups. Thus, men can be victims of sex discrimination, caucasians can be victims of race discrimination, and Christians can suffer religious discrimination.

Second, as this Court also recognizes, there is no uniformity of thought among people of any given group concerning the presumed characteristics of others in that class. Accordingly, a man who is discriminated against by another man because of his sex has the same legal rights under Title VII that he would have had had the decisionmaker been a woman. Since sexual harassment is merely a subset of sex discrimination, it follows *a priori* that a man who is sexually harassed can assert his legal rights under Title VII, regardless of whether the perpetrator is also a man.

[2] *But see Nash v. Electrospace Sys., Inc., supra* note 1.

A. Individuals in Majority Groups Can Be Victimized by Discrimination.

As this Court has stated, males as well as females are protected by Title VII against discrimination because of sex. *Newport News Shipbuilding & Dry Dock v. EEOC,* 462 U.S. 669, 682 (1983). An employer's practice, therefore, of providing less health insurance coverage to the spouses of male employees than it provides to the spouses of female employees

> [does] not pass the simple test of Title VII discrimination that we enunciated in *Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 711 (1978), for it would treat a male employee with dependents "in a manner which but for that person's sex would be different."

462 U.S. at 683. The gender of the decisionmaker was not considered relevant. *See also Johnson v. Transp. Agency,* 480 U.S. 616 (1987).[3]

Similarly, based upon the language of Title VII that prohibits discrimination against "any individual" because of that individual's race, this Court has held that caucasians, like African-Americans, have a right pursuant to Title VII to be free from racial discrimination. Citing legislative history, this Court noted in *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 279 (1976), that "[Title VII's] terms are not limited to discrimination against members of any particular race." *See also Notari v. Denver Water Dep't,* 971 F.2d 585, 588 (10th Cir. 1992) ("Title VII's protection is not limited to those individuals who are members of historically or socially disfavored groups"); *Wilson v. Bailey,* 934 F.2d 301, 304 (11th Cir.

[3] *Cf. Orr v. Orr*, 440 U.S. 268 (1979) (state law that imposed alimony obligation on husbands but not on wives violated equal protection clause of fourteenth amendment); *Craig v. Boren*, 429 U.S. 190 (1976) (law prohibiting sale of 3.2% beer to males under the age of 21 but to females under the age of 18 violated equal protection clause).

1991) (in "reverse discrimination" case, white male plaintiff must prove that job he sought was filled by "minority group member or woman"); *Livingston v. Roadway Express Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986) ("Title VII, of course, prohibits discrimination against groups that historically have not been socially disfavored"); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) ("Title VII, of course, prohibits racial discrimination against all groups"); *Lanphear v. Prokop*, 703 F.2d 1311, 1314-15 (D.C. Cir. 1983) ("Title VII prohibits discrimination against white males upon the same standards that it prohibits discrimination against members of a racial minority").

This principle shows the fallacy in *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988), which the Fifth Circuit Court of Appeals followed in *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451-52 (5th Cir. 1994). Not only did Congress not restrict the protection of Title VII to persons at a classwide disadvantage in their workplaces, but Title VII has universally been interpreted in accordance with its plain language to protect all persons from discrimination based upon the characteristics set forth in that statute. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976).

B. Members of One Group Can Discriminate Against Others in the Same Group.

1. The court failed to recognize "the many facets of human motivation."

The court of appeals' rejection of same-sex sexual harassment as a cause of action assumes that, as a matter of law, a member of one group cannot discriminate "because of sex" against another person in the same group. This assumption ignores the individuality of human beings and the vast number of different experiences that form people's beliefs and perspectives. Similarly faulty reasoning was rejected by this Court twenty years ago in a case arising from racial discrimination in the selection of grand juries. As noted in *Castaneda v. Partida*, 430 U.S. 482 (1977):

> Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of the group.

430 U.S. at 499.

Even the Fifth Circuit Court of Appeals has recognized the fallacy of an argument that members of one race cannot possibly discriminate against members of the same race. In *Hill v. Mississippi State Employment Serv.*, 918 F.2d 1233 (5th Cir. 1990), *cert. denied*, 502 U.S. 864 (1991), that court noted:

> [W]e cannot permit future Title VII analysis to be tainted by the district court's casual acceptance of the following fallacy: both black and white [ ] clerks serviced [plaintiff]; therefore, she was not the victim of discrimination, (that is, "Blacks never discriminate against other blacks.") To the argument's self-evident overbreadth, we add that the Supreme Court has rejected it.

918 F.2d at 1240-41 (*citing Castaneda*).[4] *See also Johnson v. Transp. Agency, supra* (male employee was discriminated against because of his sex when female was promoted, even though male made decision); *Wilson v. Bailey*, *supra*, 934 F.2d at 304 (white males protected by Title VII from discrimination in favor of minority group members or females) (dictum); *Jordan v. Wilson*, 649 F. Supp. 1038, 1059 n.15 (M.D. Ala. 1996) ("This court would have to be truly naive to assume that women cannot sexually discriminate against women and that many women do not harbor stereotypical, limited views of themselves"); *Veatch v. Northwestern Mem'l Hosp.*, 730 F. Supp. 809, 817 (N.D. Ill. 1990) (fact that

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[4] Cf. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978) ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination"); *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989) (replacement of minority employee by individual of same race does not preclude finding of discriminatory intent).

woman fired another woman or black fired another black does not prove that decision was free of racial and gender stereotyping that federal law attempts to remove from employers' decisionmaking).

2. An affirmance could have unintended consequences.

Affirmance of the circuit court's blanket rejection of same-sex sexual harassment could also lead to many unintended (and serious) consequences. If a person with Acquired Immune Deficiency Syndrome had been fired by a decisionmaker who is blind, would not the employer, citing the Court's affirmance in this case, argue that the fired employee has no remedy under the Americans with Disabilities Act because the decisionmaker, like the fired employee, has a disability?[5] And if a 60-year-old chief executive officer adopts the belief that the company needs a younger workforce and terminates many subordinates in their 50s and 60s, would those employees automatically lose their rights under the Age Discrimination in Employment Act merely because the decisionmaker was also a member of the protected age group? While logic and the plain language of those statutes would militate against such defenses, the arguments could clearly be made, and their adoption would cause serious and unintended harm to other victims of discrimination.

III. THE FEARED "HORSEPLAY" EFFECT.

Perhaps one of the most troubling contentions raised in support of reading Title VII to exclude same-sex sexual harassment is that mere mistreatment of employees or "horseplay" might find cognizance in a federal court. That

[5] *Cf. O'Connor v. Consol. Coin Caterers Corp.*, 116 S. Ct. 1307 (1996) (replacement of terminated over-40 plaintiff by another person in protected class does not preclude *prima facie* case under Age Discrimination in Employment Act); *DeLesstine v. Fort Wayne State Hosp.*, 682 F.2d 130 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982) (rejecting argument that *prima facie* case was destroyed by replacement of black male by female, member of another protected class).

hollow argument need not trouble this Court. Both litigants and courts are accustomed to sifting through facts and entertaining only viable cases under Title VII. This Court should not fall victim to the implicit contention that neither lawyers nor courts can be trusted to recognize a colorable Title VII claim.

Underlying the argument that male-on-male or female-on-female abuse and hostility can never be illegal is an implied assumption that workplace harassment among persons of the same gender is inherently different from other types of abuse because "boys will be boys." *See McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996). But the fact that sexual harassment may be accompanied by personal enmity or hooliganism does not detract from its character as sexual harassment. *See Quick v. Donaldson Co.*, 90 F.3d 1373 (8th Cir. 1996); *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 964-65 (8th Cir. 1993) (*Burns II*). "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive," Title VII is violated, and personal enmity or hooliganism are not excuses for conduct that otherwise violates Title VII. *Harris*, 510 U.S. at 22.

The ultimate question in all harassment cases is whether the actions were sufficiently "severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris*, 510 U.S. at 21 (*quoting Meritor*, 477 U.S. at 67). Not every offensive action will rise -- or sink -- to this level. In some cases, the offensive work-related nature of the actions will be clear; in others, it will be less clear, and in some, the acts either will not be sufficiently severe or pervasive or will not alter the victim's working conditions.

Each of these situations will require the parties and the courts to review the facts to see whether the protections of Title VII are truly involved. Such a review must focus upon the background and purposes of Title VII, *i.e.*, to prevent discrimination from infecting a person's work environment. The

defining assessment must be based upon whether there is sufficient evidence of the elements of a Title VII harassment case to permit a jury to find that discrimination based on sex created a work environment that a reasonable person would find abusive or hostile, and that the victim specifically perceived it to be so. *Harris,* 510 U.S. at 21-22.

Title VII also requires a court to examine whether the alleged harassment adversely affected the victim's terms, conditions, or privileges of employment -- not whether it had purely personal or social consequences. 42 U.S.C. § 2000e-2(a)(1); *Alvey v. Rayovac Corp.*, 922 F. Supp. 1315, 1330 (W.D. Wis. 1996). This focus upon the work environment creates a second check upon a cavalier application of Title VII to all boorish behavior, wherever it occurs. Title VII is implicated only when a person's working environment is adversely affected by alleged discriminatory acts.

It is clear that sexual harassment cases are fact-bound. Whether harassment is sufficiently severe or pervasive to create liability under Title VII involves analysis of a variety of factors and consideration of all the circumstances, an effort that clearly calls for factfinding. *Harris*, 510 U.S. at 23; *Burns v. McGregor Elec. Indus.*, 955 F.2d 559, 564 (8th Cir. 1992) (*Burns I*); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988). Sexual harassment can occur in many different forms, and there should be no excuse for unrestrained abuse of an employee because of his or her gender. *Burns II*, 989 F.2d at 965. An employee has a right to work in an environment free of sexually oriented discrimination and intimidation, ridicule and insult. *Meritor*, 477 U.S. at 65.

Whether the challenged conduct may be prohibited discrimination or *de minimis* "horseplay" is in the first instance the district court's concern when considering a motion for summary judgment. In order for it to be the former, the plaintiff must show facts that can establish an objectively as well as subjectively abusive or hostile work environment. *See, e.g., Callanan v. Runyon,* 75 F.3d 1293 (8th Cir. 1996); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (5th

Cir.), *cert. denied,* 116 S. Ct. 473 (1995). The task that faces a court when an employer alleges that the harassment was not sufficiently severe or pervasive to support a Title VII claim was recently explained by the Seventh Circuit Court of Appeals:

> [Title VII] is not designed to purge the workplace of vulgarity. Drawing the line is not always easy. On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.

Baskerville v. Culligan Int'l. Co., 50 F.3d 428, 430 (7th Cir. 1995) (citations omitted).

If facts are shown sufficient to support an inference that the conduct was severe or pervasive enough to violate Title VII, the next question for the jury's consideration is whether the abuse and hostility occurred for an illegal sex-based reason and not for some offensive but legal reason. The jury's function is to determine whether the conduct was "because of" the victim's sex.

IV. PROVING MOTIVATION IN SAME-SEX SEXUAL HARASSMENT CASES.

A. Sexual Attraction.

Proof of same-sex sexual harassment can be made in any of three ways. The most obvious way to prove that harassment occurred "because of sex" is to show that the harasser acted out of sexual attraction to the plaintiff (*i.e.*, by proving the harasser's homosexuality or bisexuality). *See Fredette v. BVP Management Assocs.,* 112 F.3d 1503, 1507 (11th Cir. 1997) ("We readily understand a homosexual male's advances towards another male to occur 'because of sex'; we understand this both out of common experience and in recognition of the parallels between this situation and the paradigm case of

harassment involving a heterosexual male and a female victim"); *Yeary v. Goodwill Indus.*, 107 F.3d 443, 447-48 (6th Cir. 1997) ("[T]his case is about as traditional as they come, albeit with a twist. It is about an employee making sexual propositions to and physically assaulting a coworker because, it appears, he finds that coworker sexually attractive"); *Wrightson v. Pizza Hut*, 99 F.3d 138 (4th Cir. 1996) ("[A] claim under Title VII for same-sex 'hostile work environment' harassment may lie where the perpetrator of the sexual harassment is homosexual"). As the Fourth Circuit Court of Appeals remarked in *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 752 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996), courts will operate from a presumption that people are heterosexual, and (under the "attraction" form of proof) this presumption must be overcome by the plaintiff's evidence to the contrary before he or she may proceed with a same-gender harassment case.

One obvious problem with this method of proof is that the requisite evidence may not be easy to obtain. It could, for example, necessitate mental examinations of the alleged perpetrator under Fed. R. Civ. P. 35 to discover any latent homosexual or bisexual tendencies.

This method of proof also incorrectly presumes that sexual attraction, rather than an abuse of power, is always what motivates a sexual harasser. Yet proof of sexual attraction has been specifically rejected as a requirement when a female is sexually harassed by a presumably heterosexual male supervisor. *See, e.g., McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985).

B. Disparate Treatment.

A second way to prove liability under Title VII for same-sex harassment is to prove that the perpetrator harassed only employees of his or her own gender. This method of proof was used in *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372 (8th Cir. 1996). The *Quick* court observed that, should the evidence show incidents of the challenged conduct by the male perpetrators against only male and not female employees, a

reasonable jury could find that the treatment of men was worse than that of women. This method of proof is useful in workplaces where both men and women are employed but the perpetrator subjects only an employee of the same gender to sexual harassment.

This method of proof should not, however, require proof of gender-based animus. As the Seventh Circuit Court of Appeals recently pointed out in *City of Belleville, supra*, 1997 WL 400219 at 16 n.19, proving that the perpetrator has an animus against his or her own gender is not likely to be an easy task. Again, if such proof were required, mental examinations pursuant to Rule 35 might be required.

Requiring proof of such animus also would ignore the many decisions holding that an individual victim of discrimination need not prove that the decisionmaker was hostile to the entire class of which the plaintiff is a member. Title VII protects individual people and does not require proof of group animus. *Connecticut v. Teal*, 457 U.S. 440, 458 (1982).

C. The Sexual Nature of the Harassment.

The third way to prove that same-sex sexual harassment occurs "because of" the victim's sex is to show that the conduct itself was sexual in nature. Regardless of whether the individual perpetrator regards himself or herself as homosexual or is shown to be latently so, acts involving sexuality are sexual *per se*.[6] This was specifically addressed in *City of Belleville, supra*, in which the court noted:

> Frankly, we find it hard to think of a situation in which someone intentionally grabs another's

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[6] The nonconsensual sexual acts alleged in this case could, for example, result from a psychological disorder known as sexual sadism, in which an individual is sexually aroused by the suffering of a victim (whether consenting or nonconsenting), such suffering sometimes brought about by restraining, beating, or raping the victim. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH ED. ("DSM-IV") at 530 (1994 American Psychiatric Association).

> testicles for reasons entirely unrelated to that person's gender. But the overall context of the harassment alleged in this case -- the name-calling, the references to sexual assault, and the intrusive, intimate touching, all of which expressly invoked H.'s gender -- certainly makes it reasonable to infer that the workplace was made hostile to him because of his gender.

Id., 1997 WL 400219 at 14. *Cf. Andrews v. City of Philadelphia,* 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) ("[T]he intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course"); *Nichols v. Frank,* 42 F.3d 503, 511 (9th Cir. 1994) ("Sexual harassment is *ordinarily* based on sex. What else could it be based on?" [emphasis in original]).

D. Application of These Principles to the Instant Case.

The record developed in this case indicates that the sexual harassment perpetrated upon Joseph Oncale might be proved through any one of these three methods. Although he may not have specifically alleged that the perpetrators (or any one of them) were homosexual or bisexual, he certainly was threatened with homosexual rape.

The parties have agreed that there were no women working on the offshore drilling rig where the events took place, but it is entirely possible that, at trial, Mr. Oncale could present evidence that, when the perpetrators reported back at the home office for reassignment, for example, they did not harass or assault female co-workers as they had harassed and assaulted him. A jury also could reasonably conclude that a person engaging in conduct that is specifically sexual in nature is doing so for his or her own sexual gratification with respect to the victim -- and therefore because of his sex. Joseph Oncale should have the opportunity to offer his proof and let the finder of fact decide the factual issues presented by his case.

Conclusion

The court of appeals, in interpreting Title VII to exclude all same-sex harassment cases solely because of the gender of the harassers, ignored not only the plain language of the statute but the standard required for any grant of summary judgment. By holding that his coworkers' harassment of Joseph Oncale in sexually oriented ways was not and could not have been done "because of [his] sex" as a matter of law, the court precluded genuine factfinding on this crucial issue. The decision below should be reversed.

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Respectfully submitted,

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